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MK ASSOCIATES SDN BHD v. BANK ISLAM MALAYSIA BHD

HIGH COURT MALAYA, KUALA LUMPUR
ASMABI MOHAMAD J
[ORIGINATING SUMMONS NO: 24M-7-02-2014]
29 JANUARY 2015

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BANKING: *Banks and banking business – Islamic banking – Concept of Ta'widh – Imposition of late payment charges on defaulters – Entitlement to charge Ta'widh – Event of default took place before Ta'widh introduced into Islamic Financial Institution – Whether imposition of Ta'widh had retrospective effect*

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CONTRACT: *Contractual terms – Express terms – Islamic banking – Contract on fair terms – Mutual terms of contracting parties – Imposition of late payment charges – Ta'widh – Customary application – Whether Ta'widh could be imposed when contract silent – Whether imposition of Ta'widh could be implied within contract – Whether Ta'widh could be inferred into a contract between contracting parties as custom*

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On 9 March 1994, the defendant, an Islamic Financial Institution ('IFI'), had granted the plaintiff an Islamic financing facility premised on the *Al Bai Bithaman Ajil* ('BBA Facility') upon the terms of the Property Purchase Agreement, Property Sale Agreement and Agency Agreement all dated 9 March 1994 ('Agreements'). The purpose of the BBA Facility was to facilitate the plaintiff together with its subsidiary company, MK Golf Bhd, to redeem several pieces of land ('the Lands') that was charged to several financial institutions and the balance was to be utilised as working capital for the plaintiff and its subsidiaries. The BBA Facility was a syndicated financing and the defendant was appointed as the manager and agent for a group of investors, which included the defendant itself ('Investors'). By virtue of the Agreements, the plaintiff and its subsidiary company had executed a legal charge over the Lands in favour of the defendant as the agent and trustee for the Investors. On or around 28 February 1998, the plaintiff had defaulted in its obligation resulting in the termination of the BBA Facility. Subsequently the defendant had issued a letter of demand to the plaintiff. Meanwhile, on 14 February 1998, the Shariah Advisory Council of Bank Negara Malaysia ('SAC') had made a resolution pertaining to imposition of late payment or penalty charges on defaulters known as *Ta'widh* ('Resolution'). *Vide* letter dated 10 December 1998, Bank Negara Malaysia had issued a notification to the defendant stating that *Ta'widh* is to take effect commencing from 1 January 1999 to existing and new agreements. The defendant then commenced foreclosure proceedings to foreclose some of the Lands. On 5 December 2005, the plaintiff was ordered by the court to be wound-up and subsequently a liquidator was appointed. In April 2012, the liquidator sold several pieces of the plaintiff's land to a purchaser and upon completion of the sale, the redemption sum of RM12,758,792.37 was paid to the defendant. The liquidator then sought from the defendant a detailed account of how the

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defendant had arrived at the said figure of RM12,758,792.37. *Vide* letter dated 6 December 2012, the defendant replied and furnished a statement of account giving particulars of how the sum of RM10,384,262.88 as *Ta'widh* from the month of January 2000 to June 2012 was arrived at. It was the plaintiff's contention that at the time the agreements were executed, the resolution pertaining to *Ta'widh* had not been made by SAC and therefore the defendant was not entitled to charge *Ta'widh* of RM10,384,262.88. The defendant, on the other hand contended that it had the right to charge *Ta'widh* pursuant to Bank Negara's letter dated 10 December 1998. Thus, the plaintiff had filed this application. The questions that arose for determination were *inter alia*, (i) whether the defendant was entitled in law to charge the plaintiff *Ta'widh* arising from default in payment of the re-sale price of the properties in respect of an Islamic Financing Facility granted by the defendant to the plaintiff premised on BBA Facility pursuant to the Agreements; (ii) whether the defendant was entitled in law to charge the plaintiff *Ta'widh*; and (iii) whether the defendant was entitled to charge *Ta'widh* in the sum of RM10,384,262.88.

Held (allowing plaintiff's claim with costs):

(1) *Ta'widh* is a claim for actual loss suffered by an IFI. This right is not absolute and shall depend on a number of conditions. The most important condition is the requirement that the IFI act fairly and justly when exercising that right. The objective of Shariah is to secure fairness for the contracting parties in any financial, business or social contract that they enter into. The legal maxim 'the fundamental requirement in every contract is justice, this is what is expected from both parties in the contract' is therefore applicable. The defendant is required to act fairly and justly when claiming *Ta'widh*. The defendant ought to have informed the plaintiff that the plaintiff is subjected to *Ta'widh* and the rate at which such *Ta'widh* is to be applied must be made known before it can claim for *Ta'widh*. Transactions between the contracting parties are based on mutual consent or at least the consent of the person who imposes on himself a condition. (paras 26, 28 & 29)

(2) Mutual consent is required on the terms of agreement, and further consent is required for the lawful appropriation of property. Thus, the plaintiff must know of the imposition of *Ta'widh* so that consent could be given freely. Obviously, the plaintiff in this case did not know the imposition of *Ta'widh* on the financing facility granted to it. This came to light only after the plaintiff had made all payments due on 6 December 2012. Further, the plaintiff was also not informed of the rate of 3% of *Ta'widh* that was imposed on it until all payments had been made. It was therefore wrong for the defendant to tax the plaintiff by way of *Ta'widh* in the sum of RM10,384,262.88. (para 29)

(3) *Ta'widh* could be implied if it is a custom, which is assumed to be within the contemplation and/or knowledge of the contracting parties. Even if *Ta'widh* had not been expressly provided in the contract, *Ta'widh* may be inferred into the contract between the contracting parties as a custom provided that the following conditions have been satisfied, *inter alia*, (i) it should not violate the Shariah otherwise it is regarded as invalid; (ii) the customary practice should be constant or predominant; (iii) the customary practice should be in existence at the time the transaction is entered into; and (iv) the two contracting parties must not have agreed to a condition contrary to the customary practice. If they had agreed to the contrary, then the customary practice is not recognised. In this case, item (ii) and (iii) had not been satisfied. (para 30)

(4) At the time the agreements were entered into *Ta'widh* was not practised by the IFI. *Ta'widh* was only introduced after the SAC's Resolution in 1998. The said resolution was to take effect only on 1 January 1999 to existing and new agreements. Therefore, *Ta'widh* shall be applicable only on or after 1 January 1999. The plaintiff in this case had defaulted on 28 February 1998. The notice of default had been sent on 13 April 1998 followed by the foreclosure proceedings having been instituted against the plaintiff. At the time, the financing ended *Ta'widh* was not a practice within the IFI. As it was not a practice to impose *Ta'widh* and the BNM ruling was effective on 1 January 1999 had come into existence and the financing agreements had already been terminated. The parties too had not executed any supplementary agreement for the imposition of *Ta'widh* on the financing. Therefore, *Ta'widh* could not be implied into the agreements. (para 30)

Legislation referred to:
Bankruptcy Act 1967, s. 8(2)
Companies Act 1965, s. 218

Other source(s) referred to:
Al-Sayuti, *A-Sybah Wa al-Nazair*, pp 83-84 in BNM, Shariah Resolutions in Islamic Finance, p 26
Al Wahbah Zuhaily, *at-Tafsir al-Munir, Dar-al-fikri, Beirut*, Juzud 3, pp 116, 129, 130
BNM Shariah Resolutions in Islamic Finance (Kuala Lumpur: BNM 2007)
Contemporary Issues in Islamic Finance: Deliberation at the International Shariah Scholars Dialogue 2006, ed, BNM (Kuala Lumpur: BNM 2008), p. 130
Dr Muhammad Busaq, *al ta'widh 'an al-Darar fi Fiqh al-Islami, Dar ishbiliya li al-nash wa al-tauzi' Riyad*, 1999, p 155
Fazlun Karim, *Al Hadis English Translation of Mishkat-Ul-Masabiah*, 3rd edn
Hans Wehr, *Dictionary of Modern Written Arabic, Wiesbaden: Otto Harrassowitz*, 3rd Printing, London, p 657
Harith Suleiman Faruqi, *Faruqi Law Dictionary English-Arabic, ibrarie du Liban* 1991, p 146
ISRA's, *Compendium for Islamic Financial Term's Arabic-English* (Kuala Lumpur: ISRA, 2010), p 127
Maw'suah al'Fiqhhiyah, Juzuk ke-13, Bab: (Tauhid), p 35

Mohamad Akram Laldin and Others, *Islamic Legal Maxims and Their Application in Islamic Finance* (Kuala Lumpur: ISRA, 2013), pp 22, 26, 136, 137, 138, 143
Mohamad Akram Laldin, *The fiqh Academy Journal, Majallah Majma, al-Fiqh al-Islami,* vol 14, part 4, p 510
Muhammad 'Abd al-Razaq al-Sayyid Ibrahim al-Tabataba'i, *"Compensation for Damage and Fine for Late Payment of Debts; An Applied Study an Islamic Finances Institutions in The State of Kuwait," in Contemporary Issues in Islamic Finance: Deliberation at the International Shariah Scholars Dialogue 2006*, ed BNM (Kuala Lumpur BNM, 2008 p 106)
Muhammad Abu Ja'far al-Tabari, *Jami' al-Bayan fi Tafsir al Qur'an, Dar al-Ma'rifah li li at-tib'ah wa al-nashr, Beirut* 1980, vol 3, p 77
Saad bin Malik Al-Khudari *An-Navawi-An Nawawi's 40 Hadith*
SE Rayner, *The Theory of Contract in Islamic Law: A Comparative Analysis with Particular Reference to the Modern Legislation in Kuwait, Bahrain and United Arab Emirates* (London: Graham and Trotman, 1991), p 189

For the plaintiff - Prakash Lachimanan (Syed Ismit Putra Syed Mohd Fuad with him); M/s Mathews Hun Lachimanan
For the defendant - Oommen Koshy; M/s Skrine

Reported by Thirunavakarasu Vijayan

JUDGMENT

Asmabi Mohamad J:

Introduction

[1] By its amended originating summons dated 20 March 2014 ("encl. 1") the plaintiff had posed the following questions for the determination of this court:

(i) whether the defendant is entitled in law to charge the plaintiff *Ta'widh* arising from default in payment of the re-sale price of the properties in respect of an Islamic financing facility granted by the defendant to the plaintiff premised on the *Al-Bai Bithaman Ajil* ("BBA") pursuant to the property purchase agreement, property sale agreement and agency agreement all dated 9 March 1994;

(ii) whether the defendant is entitled in law to charge the plaintiff *Ta'widh* and whether the defendant is entitled to charge *Ta'widh* in the sum of RM10,384,262.88;

(iii) if it is determined that the defendant is not entitled in law to charge *Ta'widh* or if the defendant is entitled to the sum of lesser than RM10,384,262.88 as *Ta'widh,* the plaintiff sought against the defendant the following reliefs:

(a) A declaration that the defendants is not entitled to charge *Ta'widh* in law; and/or

A (b) An order for the defendant to return and/or pay the plaintiff the sum of RM10,384,262.88 charged as *Ta'widh;* and/or

(c) An order for the defendant to return and/or pay the plaintiff such sum as determined by the court as monies in excess of the amount lawfully due to the defendant as *Ta'widh*; and

B (d) Interest be awarded against the defendant at a rate deemed appropriate by this court from 18 July 2012 until full payment of any such sum this court orders the defendant to pay the plaintiff.

(iv) costs, and such further and other relief as deemed fit by this court.

C **[2]** The plaintiff averred that the defendant was not entitled to *Ta'widh* for the following reasons:

(i) the default in the payment of the facility was not due to the plaintiff's negligence but due to its insolvency;

D (ii) pursuant to the defendant's statement of account, after factoring in profit of RM15,082,100 the balance owing to the defendant was RM8,958,814.41 and if the said sum remained unpaid, the profit of the defendant would be reduced from RM15,082,100 to RM6,123,285.59;

E (iii) pursuant to the defendant's statement of account, the alleged outstanding balance after deducting all costs and expenses and without taking into account *Ta'widh* was RM8,958,814.41. Therefore, the *Ta'widh* of RM10,384,262.88 is higher than the outstanding balance;

(iv) the imposition of any *Ta'widh* would offend the salient features of the

F *Al Bithaman Ajil* facility;

(v) the concept of *Ta'widh* was introduced subsequent to the grant of the Islamic financial facility to the plaintiff and after the execution of the property purchase agreement, property sale agreement and agency agreement all dated 9 March 1994. At the time of the execution of these

G agreements, the concept of *Ta'widh* was not applicable to the Islamic financing facility granted to the plaintiff; and

(vi) the imposition of *Ta'widh* for the period between January 2000 until June 2012 contravened s. 8(2) of the Bankruptcy Act 1967.

H **[3]** Further grounds were as stated in the affidavits of the plaintiff filed in support of this OS.

[4] After perusal of the relevant affidavits, including the expert reports prepared by each party's expert, written submissions by both learned counsel for the plaintiff and the defendant and upon hearing oral submissions, on

I 30 October 2014, I allowed the reliefs sought by the plaintiff with costs (the particulars of which will be discussed at the later part of this judgment). After hearing a short submissions on costs I allowed costs, of RM50,000 to the plaintiff to be paid by the defendant.

The Documents

[5] For the purpose of encl. 1, the following documents were filed and referred to by this court:

(i) amended originating summons dated 20 March 2014 ("encl. 1");

(ii) affidavit in support of Neoh Chin Wah affirmed on 13 February 2014 ("encl. 2");

(iii) affidavit in reply of Nurulzahar bin Ghazali affirmed on 4 April 2014 ("encl. 6");

(iv) affidavit in reply of Neoh Chin Wah affirmed on 10 April 2014 ("encl. 7");

(v) additional affidavit of Nurulzahar bin Ghazali affirmed on 8 August 2014 ("encl. 12");

(vi) Second additional affidavit of Nurulzahar bin Ghazali affirmed on 24 October 2014 ("encl. 14"); and

(vii) Plaintiff further affidavit by Prakash Lachimanan (No. K/P: 761016-01-6725) affirmed on 3 September 2014 ("encl. 13").

The Background Facts

[6] The facts leading to the filing of encl. 1 were not really in dispute. These facts were as follows:

(i) the plaintiff was ordered to be wound-up on 5 December 2005 under s. 218 of the Companies Act 1965 *vide* the order of the Kuala Lumpur High Court in Winding Up Petition No. D4-21-32-2004. Pursuant to the order of the High Court dated 16 August 2010, Mr Neoh Chin Wah was appointed as the liquidator of the plaintiff (see exh. "NCW1" of encl. 2);

(ii) the plaintiff's subsidiary company, MK Golf Bhd ("MK Golf"), was ordered to be wound-up on 17 June 2010 *vide* Petition No. D-28NCC-252-2010;

(iii) the plaintiff was granted an Islamic financing facility premised on the *Al Bai Bithaman Ajil* ("the BBA facility") from the defendant upon the terms of the property purchase agreement, property sale agreement and agency agreement all dated 9 March 1994 (see exh. "NCW2", "NCW3" and "NCW4" of encl. 2 ("agreements"));

(iv) the plaintiff was the registered proprietor of eleven pieces of land described as follows:

(a) HS (D) 2049 PT No. 1390, Mukim Serendah Ulu Selangor, ("Lot 1391");

(b) HS (D) 4329 PT No. 1391, Mukim Serendah Ulu Selangor, ("Lot 1391");

(c) HS (D) 2052 PT No. 1393, Mukim Serendah Ulu Selangor, ("Lot 1393");

(d) HS (D) 4329 PT No. 1391, Mukim Serendah Ulu Selangor, ("Lot 1391");

(e) HS (M) 5339 PT No. 6272, Bandar Baru Sungai Buluh, Mukim Sungai Buluh, Selangor;

(f) HS (M) 5336 PT No. 6279, Tempat Bandar Baru Sungai Buluh, Mukim Sungai Buluh, Selangor;

(g) HS (M) 5321 PT No. 6371, Tempat Bandar Baru Sungai Buluh, Mukim Sungai Buluh, Selangor;

(h) HS (M) 5324 PT No. 6333, Tempat Bandar Baru Sungai Buluh, Mukim Sungai Buluh, Selangor;

(i) HS (M) 5405 PT No. 6350, Tempat Bandar Baru Sungai Buluh, Mukim Sungai Buluh, Selangor;

(j) HS (M) 5374 PT No. 6349, Tempat Bandar Baru Sungai Buluh, Mukim Sungai Buluh, Selangor;

(k) HS (M) 5360 PT No. 6417, Tempat Bandar Baru Sungai Buluh, Mukim Sungai Buluh, Selangor; and

(l) HS (M) 5317 PT No. 6418, Tempat Bandar Baru Sungai Buluh, Mukim Sungai Buluh, Selangor.

("Collectively referred to as the land")

[7] MK Golf was the registered owner of the land described as HS (D) 2051 PT No. 1392, Mukim Serendah Ulu Selangor ("MK Golf land").

[8] The land and MK land were encumbered and subject to settlement of monies due to several financial institutions and the said BBA facility was to enable the land to be redeemed and the balance to be utilised as working capital for the plaintiff and its subsidiaries.

[9] The BBA facility was a syndicated financing and the defendant was appointed the manager and agent for the group of investors comprising of:

(i) Syarikat Takaful Malaysia Sdn Bhd;

(ii) Arab-Malaysian Merchant Bank Bhd;

(iii) Pemegang-pemegang Amanah Yayasan Pembangunan Ekonomi Islam Malaysia Berdaftar;

(iv) Kewangan Industri Bhd;

(v) Bank Kerjasama Rakyat Malaysia Bhd; and

(vi) Bank Islam Malaysia Bhd ("the defendant").

(collectively known as "the investors")

[10] Pursuant to the property sale agreement, the said lands were sold to the investors at the purchase price of RM37,000,000 and the same land was purchased by the investors *vide* property purchase agreement at the sale price of RM52,082,100. The plaintiff executed a legal charge over the said land and had also caused its subsidiary MK Golf to execute a legal charge over the said MK Golf land in favour of the defendant as the agent and trustee for the investors.

[11] On and/or before 28 February 1998, the plaintiff had defaulted in its obligations under the property sale agreement. This had led to the issuance of a notice pursuant to cl. 8.1 of the property sale agreement from the defendant to the plaintiff to demand the payment of RM29,228,765 from the plaintiff. The defendant then commenced foreclosure proceedings at the Shah Alam High Court *vide* Originating Summons No. MT1-24-696-1998 to foreclose some of the lands (see exh. "NCW-5" of encl. 2).

[12] The MK Golf land was auctioned on 26 April 2011 for the sum of RM23,619,600 and the proceeds of the auction was paid towards the BBA to reduce the amount due and payable to the investors.

[13] In April 2012, the liquidator accepted an offer from Ultimate Essence Sdn Bhd ("the purchaser") to purchase several lands including Lot 1391 and 1393. A sale and purchase agreement was entered into by the plaintiff and the purchaser in respect of the said sale dated 19 April 2012. The sale of the said land was completed on 18 July 2012 and the redemption sum was paid to the defendant in the sum of RM12,758,792.37 (see exh. "NCW-9" of encl. 2).

[14] By its letter dated 8 October 2012, the liquidator had sought from the defendant a detailed account of how the defendant had arrived at the figure of RM12,758,992.37. This letter was responded by the defendant *vide* its letter dated 6 December 2012 whereby the defendant had furnished a statement of account giving the particulars of how the sum of RM10,384,262.88 as *Ta'widh* from the month of January 2000 to June 2012 was arrived at. Although the full sum was RM19,343,077.29, the defendant agreed to accept the sum of RM12,758,992.37 as the redemption sum (see exh. "NCW-12" of encl. 2).

[15] It was the contention of the plaintiff that in view of the fact that at the time the agreements were executed, the resolution pertaining to *Ta'widh* had not been made by the Shariah Advisory Council of Bank Negara Malaysia ("SAC") the defendant was not entitled to charge *Ta'widh* in the sum of RM10,384,262.88 as was done in this case.

[16] The defendant on the other hand contended that it had the right to charge *Ta'widh* pursuant to Bank Negara's letter dated 10 December 1998 ("Bank Negara letter" (see exh. "BIMB-1" of encl. 6)).

A **Issues Raised By The Respective Parties**

For The Plaintiff

[17] Learned counsel for the plaintiff, among others, raised the following arguments:

B (i) the defendant was not entitled to impose *Ta'widh* as the imposition of *Ta'widh* would offend the salient features of the BBA facility.

(ii) *Ta'widh* was introduced subsequent to the grant of the BBA facility and the execution of the agreements. The concept of *Ta'widh* was not applicable to the BBA facility granted to the plaintiff as the same had been executed in 1994 when *Ta'widh* was yet to be introduced.

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(iii) the notice from Bank Negara Malaysia dated 10 December 1998 referred by the defendant did not permit the defendant to impose *Ta'widh* from 1 January 1999. The notice refers to approval to impose penalty, which is *Gharamah* and not *Ta'widh*, which is compensation.

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(iv) even if the penalty in the notice included *Ta'widh*, Bank Negara Malaysia expressly stated that penalty charges applies to new facilities or current facilities unless the facility agreement did not impose any penalty for default in payment.

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(v) the agreements did not impose any penalty charges in the event of default. Clause 8.1 of the property sale agreement stipulate that in event of default the defendant shall:

(a) Send to the plaintiff a notice to declare the indebtedness immediately due and payable; and/or

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(b) Immediately enforce any or all the remedies provided under the security documents.

(vi) clause 1.1 of the property sale agreement defined indebtedness as "the sale price or any part thereof and all other monies whatsoever including but not limited to fees, cost (including legal costs on a solicitors and client basis), charges and expenses due and payable to the investors under the security documents and the agency agreement, which include any obligation for the payment of the sale price". Therefore, going by this definition, the indebtedness did not include penalty charges. The definition too did not specifically mentioned *Ta'widh* could be charged.

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(vii) in view of the aforesaid the defendant was not entitled to impose *Ta'widh* against the plaintiff.

I (viii) in the alternative, the plaintiff contended that even if the defendant could impose *Ta'widh*, the RM10,384,262 being *Ta'widh* from January 2000 to June 2012 was excessive.

(ix) after factoring in profit of RM15,082,100, the balance after deducting all costs and expenses and if the sum of RM8,958,814.41 remained unpaid the profit of the defendant would be reduced from RM15,082,100 to RM6,123,285.59. As such the *Ta'widh* was higher than the outstanding balanced or reduced profit.

(x) Section 8(2) of the Bankruptcy Act 1967 would be applicable. The defendant should not be allowed to impose any late payment charges whether the same is described as interest or *Ta'widh* beyond the date the plaintiff was ordered to be wound-up.

(xi) in view of the above, the defendant had wrongfully imposed *Ta'widh* on the plaintiff. Therefore, the plaintiff prayed for the relief to be granted in its favour.

For The Defendants

[18] Learned counsel for the defendants raised the following arguments:

(i) the defendant was entitled to impose *ta'widh* pursuant to Bank Negara Malaysia's letter dated 10 December 1998 ("Bank Negara letter" (see exh. "BIMB-1" of encl. 6)). Despite the agreements were silent on the issue of *Ta'widh* pursuant to the Bank Negara's letter penalty could be imposed on new and existing financing except if the financing agreement had expressly provided not to impose penalty in event of default on the part of the borrower to settle the amount due and outstanding.

(ii) it did not matter even if the provision with regard to *Ta'widh* was yet to be enforced at the time the agreements were executed by the plaintiff and the defendant, as the right to claim *Ta'widh* was implied in the contract. *Ta'widh* need be written or stated in the contract.

(iii) the defendant did not charge RM10,384,262.88 as claimed by the plaintiff.

(iv) the plaintiff did not dispute the sum claimed by the defendant when the redemption statements were issued. The defendant was entitled to RM12,758,992.37 as redemption sum.

(v) The plaintiff acted *mala fide* in claiming the refund of RM10,384,262.88 as this was not the amount charged by the defendant.

(vi) Section 8(2) of the Bankruptcy Act 1967 was not applicable as it only applied to a claim for interest and not a claim for *Ta'widh*.

(vii) The defendant had the right to charge *Ta'widh* as it formed part of the 'costs' defined under the term 'indebtedness' in the property sale agreement executed by the plaintiff and the defendant.

(viii) the plaintiff was bound by the redemption statement. It did not matter if the BBA facility was executed when the concept of *Ta'widh* was yet to be introduced. There was nothing in the BBA facility, which provided that no penalty might be imposed on late payment. Therefore, in the absence of such express provision the defendant had the right to impose *Ta'widh*.

(ix) the total redemption sum of RM12,758,992.37 was clearly stated in the redemption statement. Therefore, the plaintiff had notice of the redemption sum at the material time.

(x) the defendant did not charge RM10,384,262.88 as *Ta'widh*. The plaintiff had not adduced any evidence to refute the same. Although the *Ta'widh* payable was RM10,384,262.88 the defendant did not charge that amount but a lesser amount. *Ta'widh* and legal charges was only RM3,800,177.96.

(xi) the plaintiff was bound by the redemption statement. The offer by the defendant had been accepted. The plaintiff was given ample opportunity to refute the redemption statement but chose not to dispute the same. Therefore, this was merely an afterthought.

(xii) section 8(2) of the Bankruptcy Act 1967 did not apply to the case at hand. The wording of that section is clear and it only applied to interest and it did not impose any limit on other charges such as *Ta'widh*. *Ta'widh* and interest are not the same. Section 8(2) did not expressly provide for *Ta'widh*. Therefore, the court must not add words into the Legislature. The duty of the court is only to interpret the law and give effect to the true meaning.

(xiii) in view of the aforesaid, the defendant was justified in imposing *Ta'widh* on the BBA facility.

Findings Of The Court

[19] After having perused all the affidavits and the written submissions filed herein and after hearing oral submissions by both learned counsel and after having the benefit of understanding the opinion of the Shariah expert of the plaintiff as well as the expert of the defendant pertaining to *Ta'widh* and the right to *Ta'widh* the findings of this court are as follows:

(i) firstly, it was not disputed that the defendant in this case had imposed and charged the plaintiff *Ta'widh* for the period from January 2000 to June 2012.

(ii) it is also not disputed that at the time the plaintiff and the defendant entered into the BBA facility, on 9 March 1994, the SAC had not introduced the concept of *Ta'widh* in the Islamic financial scheme of financing. It fact it was only in its fourth meeting dated 14 February 1998 that the SAC had allowed Islamic Financial Institution to charge *Ta'widh* on defaulters.

(iii) a perusal of the agreement would also disclose that *Ta'widh* did not form part of the express terms and/or conditions of the agreements. Neither had the defendant informed the plaintiff prior to 6 December 2012 of its intention to impose *Ta'widh* and/or that the rate of 3% by way of *Ta'widh* was to be imposed on the plaintiff. A

(iv) *vide* its letter dated 6 December 2012, the defendant had caused the statement of account to be furnished to the liquidator providing the details of the calculation of *Ta'widh* in respect of the financing. The rate of the *Ta'widh* was stated as 3% per annum. B

(v) with regard to whether *Ta'widh* could be imposed in respect of the agreements, I had the diverging views from two experts, one Dr Sherin Kunnhibava, the expert appointed by the plaintiff ("Dr Sherin") and the other Dr Abdul Halim Muhammad, the expert appointed by the defendant ("Dr Abdul Halim"). C

(vi) These two experts did not seem to differ much in terms of the definition and meaning of *Ta'widh*. However, their views were poles apart in terms of the applicability of *Ta'widh* to the factual matrix of this case. D

(vii) Dr Abdul Halim, the chairman of bairuni research had adopted the definition of *Ta'widh* from the following: E

(a) Hans Wehr, *Dictionary of Modern Written Arabic, Wiesbaden: Otto Harrassowitz*, 3rd Printing, London, p. 657; Rujuk juga Harith Suleiman Faruqi, *Faruqi Law Dictionary English-Arabic, ibrarie du Liban 1991*, p. 146 defined *Ta'widh* as follows: F

> *Ta'widh* replacement, substitution, compensation, indemnification, reparation ('an for), reimbursement, restitution, settlement ('an for); (pl. ât), return, consideration, equivalent, substitute, recompense, compensation, satisfaction, set-off, amends, indemnity, damages, reparation, compensation (psych), Reparation (as war indemnity). G

(b) Dr Muhammad Busaq, *al Ta'widh 'an al-Darar fi Fiqh al-Islami, Dar ishbiliya li al-nash wa al-tauzi*' Riyad,1999, p. 155 (referred to in the Article Mawqif al-Syeikh Muhammad Taqi al-Uthmani fi Masalah al *Ta'widh* 'An Dharar al-matal fi Bai' al-Taqsit, Jurnal Fiqh, No. 7 (2010) 243-256, p. 245 defined *al-Ta'widh* as follows): H

> sebagai pembayaran harta yang dikenakan ke atas orang yang melakukan kemudaratan ke atas orang lain yang melibatkan diri seseorang ataupun harta. Manakala kemudaratan (*ad-darar*) mengikut definisi yang diberikan oleh Muhammad Busaq setiap perkara yang boleh membawa kesakitan kepada seseorang yang melibatkan hartanya yang bernilai, tubuh badannya yang atau penghormatannya yang dilindungi syariat. I

(c) *Maw'suah al'Fiqhhiyah*, Juzuk ke-13, Bab: (Tauhid), p. 35 defined *Ta'widh* to mean:

> Pembayaran imbalan berbentuk wang yang diwajibkan ke atas kemudaratan yang berlaku disebabkan oleh pihak lain.

(viii) having studied the definition of *Ta'widh* from ISRA's *Compendium for Islamic Financial Term's Arabic-English* (Kuala Lumpur: ISRA, 2010), p. 127, *The fiqh Academy Journal, Majallah Majma, al-Fiqh al-Islami*, vol. 14, part 4, p. 510 as quoted in Muhamad Akram Laldin, "The Principles of Compensation and Penalty Charges in Dealing with Loan Default in Islamic Finance", in *Contemporary Issues in Islamic Finance: Deliberation at the International Shariah Scholars Dialogue 2006*, ed, BNM (Kuala Lumpur: BNM 2008), p. 130 and the *BNM Shariah Resolutions in Islamic Finance* (Kuala Lumpur: BNM 2007) Dr Sherin concluded as follows:

> *Ta'widh* is thus compensation for damage done to another, in terms of Islamic financial institutions (IFI), *Ta'widh* refers to a claim for compensation arising from actual loss suffered by the financier due to the delay in the payment of financing or debt agreement by the customer (BNM, Resolutions of Shariah Advisory Council of Bank Negara" (Kuala Lumpur: BNM,2010, p.129). It should be differentiated from *gharamah* which refers to penalty charges imposed for delayed payment in financing or debt agreements where actual loss need not be proved. For *gharamah* the IFI cannot keep the proceeds but must channel it to approved charities.

(ix) Dr Sherin also opined that imposition of *Ta'widh* is permissible based from the following authorities:

(a) Al Bukhari, Sahih Bukhari also found in Fazlun Karim, *Al Hadis English Translation of Mishkat-Ul-Masabiah*, 3rd edn, which was based on the Hadith of the Prophet (PUH), narrated by Abu Hurairah Allah's Apostle said:

> Procrastination (delay) in repaying debts by a wealthy person is injustice.

(b) Saad bin Malik Al-Khudari *An- Navawi-An Nawawi's 40 Hadith*, which states:

> There should be neither harming nor reciprocating harm.

(c) The Hadith and legal maxim "there should be neither harming nor reciprocating harm" had been used in the Shariah Advisory Council's Resolution (BNM, "Resolutions of Shariah Advisory Council of Bank Negara" (Kuala Lumpur: BNM, 2010, p. 131)) as a source to allow *Ta'widh*. According to the basis of the ruling of the SAC, the delay in payment by the customer is a harm that will cause the IFI to suffer actual loss. This harm should be avoided to

ensure that the business transactions can be conducted according to the principle of market efficiency (*istiqrar ta' mul*). Dr Sherin had also concluded that the SAC also likens late payment by the customer to an act of ursurption (*ghasb*) of property, which is prohibited. The remedy for which is the compensation from the debtor. The SAC had also quoted another legal maxim "Whatever harm should be removed", as another source for the permissibility to impose *Ta'widh*. The imposition of *Ta'widh* also mitigates the "harm suffered by the financier".

(x) both experts shared the same views that the IFI is permitted to impose late payment charges in cases of default. Dr Sherin went further to illustrate that the SAC in its 4 meeting dated 14 February 1998 and 95 meeting dated 28 January 2010 and 101 meeting dated 20 May 2010 had resolved that the IFI shall impose the late payment subject to under the following conditions:

(a) The amount of *Ta'widh* cannot exceed the actual loss suffered by the IFI;

(b) The determination of *Ta'widh* is made by a third party, in Malaysia the BNM;

(c) The default or delay of payment is due to the negligence on the part of the customer;

(d) IFI should consider the customer's financial capability when imposing late payment charges;

(e) The accumulated combined late payment charges comprising of *Ta'widh* and *gharamah* cannot exceed 100% of the outstanding principal amount; and

(f) The combined late payment charge cannot be compounded on the overdue instalments or outstanding principal.

[20] Having understood the meaning of *Ta'widh* and the conditions upon which IFI can impose *Ta'widh* and/or late payment charges as discussed by the two experts, the next issue to be considered is whether the IFI can impose *Ta'widh* when the contract is silent on it and/or when at the time parties negotiated and/or entered into the contract the concept of *Ta'widh* had not been introduced into the Islamic financial system of the country and/or whether the IFI can impose *Ta'widh* and have it backdated for almost 12 years preceding the introduction of *Ta'widh*.

[21] On whether Shariah demands that all contracts between two contracting parties must be in a written form, Dr Abdul Halim opined that Shariah did not demand that all contracts must be reduced into writing to make these contracts binding. Even an oral contract suffices especially if the relationship between the two contracting parties is premised on trust and

goodwill. When one is travelling for instance and should the need arise for one party to give loan to the other for a certain term, and assuming that there is no one available to prepare a written contract, the furnishing of some form of security for the loan is sufficient for the contract to be valid (see Muhammad Abu Ja'far al-Tabari, *Jami' al-Bayan fi Tafsir al Qur'an, Dar al-Ma'rifah li li at-tib'ah wa al-nashr, Beirut 1980*, vol. 3 p. 77).

[22] Dr Abdul Halim has also relied on the opinion of Dr Wahbah Zuhaily, which stated the practice for a written contract to be prepared and witnessed is based on the Sunnah and Allah the Almighty had advocated the requirement for a written contract to be prepared and witnessed is for the purpose to preserve the property and to remind the contracting parties of their obligations (see Al Wahbah Zuhaily, *at-Tafsir al-Munir, Dar-al-fikri, Beirut*, Juzud 3 pp. 116, 129 dan 130).

[23] Based on the views discussed above, Dr Abdul Halim concluded that it is the responsibility of the debtor to settle his loan and debts pursuant to the contract. Once a contract had been executed, the obligations between parties are as stated in the written contract and if the terms of these written contracts had not been fulfilled which had resulted in the other contracting party to suffer loss, the party who was negligent and/or irresponsible shall be punished. If such situation existed then the person giving the loan and/or the creditor and/or the lender is entitled to claim not only his rights to the repayment of the loan and/or debt as agreed but also to claim for compensation. This was the basis the *ulamas* had permitted *Ta'widh* to be imposed to prevent any loss to be suffered by the lender and/or creditor as a result of the borrower's negligence in the performance his part of the bargain.

[24] Dr Abdul Halim had also opined that *Ta'widh* need not be stated in the aqad and/or contract executed by both the contracting parties as *Ta'widh* is a right the lender and/or creditor is entitled to and enforceable against the defaulter. This was an implied term of the contract which was agreed by both parties to prevent loss suffered by the lender and/or creditor as a consequence of the default on the part of the borrower.

[25] Dr Abdul Halim had also emphasised that *Ta'widh* is not a condition precedent to a valid contract. It is an option which can be exercised by the lender and/or creditor based on the concept of compensation to protect his right and interest in event of default. Irrespective of whether the provision for *Ta'widh* is expressly provided in the contract, *Ta'widh* could be imposed. There exist other provisions in the contract such as the words 'compensation', 'indemnity', 'damages' and 'compensatory' which would have the like effect. Therefore Dr Abdul Halim opined that based on the factual matrix of this case and in the light of the discussions on the definition of *Ta'widh* and its applicability to the factual matrix of this case, the defendant was entitled to charge *Ta'widh* in the manner that was done in this case.

[26] With regard to whether the IFI can impose *Ta'widh*, Dr. Sherin stated that *Ta'widh* is a claim for actual loss suffered by an IFI, this right is not absolute and shall depend on a number of conditions. The most important condition is the requirement that the IFI to act fairly and justly when exercising that right. The objective of Shariah is to secure fairness for the contracting parties in any financial, business or social contract that they enter into. The legal maxim - "the fundamental requirement in every contract is justice, this is what is expected from both parties to the contract"; is therefore applicable. (See Mohamad Akram Laldin and Others, *Islamic Legal Maxims and Their Application in Islamic finance* (Kuala Lumpur: ISRA, 2013), p. 22).

[27] Dr Sherin had relied on a decision by the OIC International Islamic Fiqh Academy ("IIFA") which is not binding but of persuasive value. IIFA had issued a resolution in its 12 session *vide* Resolution No. 109 (12/3) 23-28/9/2000 on penalty provision which recommends that a penalty clause must be made known before the damage occurs, in that, before the default. The resolution reads:

> Third: a penalty clause may either be inserted in the original contract or in the subsequent contract before the damage occurs.

(see Muhammad 'Abd al-Razaq al-Sayyid Ibrahim al-Tabataba'i, "*Compensation for Damage and Fine for Late Payment of Debts; An Applied Study an Islamic Finances Institutions in The State of Kuwait*," in *Contemporary Issues in Islamic Finance: Deliberation at the International Shariah Scholars Dialogue 2006*, ed BNM (Kuala Lumpur BNM, 2008 p. 106).

[28] According to Dr Sherin applying the above maxim to the factual matrix of the case at hand the defendant in the case at hand is required to act fairly and justly when claiming *Ta'widh*. The defendant ought to have informed the plaintiff that the plaintiff is subjected to *Ta'widh* and the rate at which such *Ta'widh* is to apply must be made known before it can claim for *Ta'widh*.

[29] Dr Sherin opined that transactions between the contracting parties are based on mutual consent or at least the consent of the person who imposes on himself a condition. This principle is supported by the following:

(i) the Verses of the Holy Qur'an Surah An-Nisa' 4:29 which states:

> O you who believe! Eat not up your property among yourselves unjustly except it be a trade amongst you, by mutual consent. And do not kill yourselves (nor kill one another). Surely, Allah is Most Merciful to you.

(ii) the Hadith narrated by Abu Hurayrah:

> When Abu Zuhrah made a business transaction with a man, he gave him the right of option. He then would tell him: Give me the right of option (to annul the bargain). He said: I heard Abu Hurayrah say: The Apostle of Allah (PBUH) said two people must separate only by mutual consent.

(iii) abu Hurairah al- Raqasshi from his uncle reported that the Messenger of Allah said:

> Behold! Opress not. Behold! The property of a man is not lawful except with his voluntary consent.

(iv) according to Ibn Hajr, there is a narration from Ibn Sirin who mentioned about a potential customer who said to the owner of some animals for hire: "Prepare for me one of the animals. Should I not hire it on such a date, I will pay you 100 dirham". Apparently, the customer did not proceed with the deal, and so, according to Qhadi Syuraih: "Whoever imposes a condition upon himself voluntarily, then that condition is binding". (see Al-Sayuti, *A-Sybah Wa al-Nazair*, pp. 83-84 in BNM, Shariah Resolutions in Islamic Finance, p. 26)

(v) the legal maxim - the general principle conferring validity of contracts is the consent of both parties, and the effective terms and conditions are what are agreed. The maxim provides a contract is valid and binding only when there is mutual consent given freely so long as it should not contradict Shariah. The terms of the contract too must be agreed upon freely (see Mohamad Akram Laldin and Others, *Islamic Legal Maxims and Their Application in Islamic finance* (Kuala Lumpur: ISRA, 2013), p. 26).

(vi) premised on the above high authorities, Dr Sherin opined that mutual consent is required on the terms of the agreement, and further consent is required for the lawful appropriation of property. In applying the above-mentioned principles and maxims to the case at hand, Dr Sherin was of the view that the plaintiff must know of the imposition of *Ta'widh* so that consent could be given freely. Obviously, the plaintiff in this case did not know of the imposition of *Ta'widh* on the financing facility granted to it. This came to light only after the plaintiff had made all payments due on 6 December 2012. Further the plaintiff was also not informed of the rate of 3% of *Ta'widh* was imposed on it until all payments had been made. In view of the above, Dr Sherin opined that it was wrong for the plaintiff to tax the plaintiff by way of *Ta'widh* in the sum of RM10,384,262.88.

[30] While Dr Abdul Halim was of the view that *Ta'widh* could be implied within the contract between the plaintiff and the defendant, Dr Sherin seemed to think otherwise. Dr Sherin was of the view that *Ta'widh* could be implied if it is a custom, which is assumed to be within the contemplation and/or knowledge of the contracting parties (see SE Rayner, *The Theory of Contract in Islamic Law: A Comparative Analysis with Particular Reference to the Modern Legislation in Kuwait, Bahrain and United Arab Emirates* (London: Graham and Trotman, 1991), p. 189).

(i) Dr Sherin supported her opinion by the following:

(a) Legal maxim - "Custom is an arbiter", which means that a dispute between two contracting parties may be resolved by reference to custom, whether general or specific, in the absence of a specific Shariah provision as long as it does not conflict with the text from the Qur'an or Sunnah (see Mohamad Akram Laldin and Others, *Islamic Legal Maxims and Their Application in Islamic Finance* (Kuala Lumpur: ISRA, 2013), p. 136).

(b) The above legal maxim means, that "any practice that is prevalent and well recognised among the people in transactions does not need to be specified or mentioned in the contractual agreement; rather, "such an action is treated like a stipulated condition in the contract". (see Mohamad Akram Laldin and Others, *Islamic Legal Maxims and Their Application in Islamic finance* (Kuala Lumpur: ISRA, 2013), p. 143).

(c) Dr Sherin added that even if *Ta'widh* had not been expressly provided in the contract, *Ta'widh* may be inferred into the contract between the contracting parties as a custom. Before *Ta'widh* can be inferred as a custom, the following conditions have to be satisfied:

(1) It should not violate the Shariah otherwise it is regarded as invalid;

(2) The customary practice should be constant or predominant;

(3) The customary practice should be in existence at the time the transaction is entered into; and

(4) The two contracting parties must not have agreed to a condition contrary to the customary practice. If they had agreed to the contrary, then the customary practice is not recognised.

(note: item (2) and (3) above had not been satisfied)

(see OIC Fiqh Academy, Urf (Custom) Resolution No. 47 (9/5) (1998)-OIC International Islamic Fiqh Academy, in its fifth session, held in Kuwait from 1-6 Jumada al-Ula, 1409 AH; also see Mohamad Akram Laldin and Others, *Islamic Legal Maxims and Their Application in Islamic Finance* (Kuala Lumpur: ISRA, 2013), pp. 137 to 138).

(d) It is not disputed that at the time the agreements were entered into *Ta'widh* was not practised by the IFI. As reflected in the Bank Negara Malaysia's letter dated 10 December 1998 ("Bank Negara letter" (see exh. "BIMB-1" of encl. 6)) *Ta'widh* was only introduced after the SAC's resolution in 1998.

(e) The said resolution was to take effect only on 1 January 1999 to existing and new agreements. Therefore, *Ta'widh* shall be applicable only on or after 1 January 1999.The plaintiff in this case had defaulted on 28 February 1998. The notice of default had been sent on 13 April 1998 followed by the foreclosure proceedings having been instituted against the plaintiff. At the time, the financing ended *Ta'widh* was not a practice within the IFI. As it was not a practice to impose *Ta'widh* and the BNM ruling was effective on 1 January 1999 had come into existence and the financing agreements had already been terminated. The parties too had not executed any supplementary agreement for the imposition of *Ta'widh* on the financing. Therefore, in view of the aforesaid *Ta'widh* cannot be implied into the agreements.

[31] I had the benefit of perusing the two diverging views from the plaintiff's expert as well as the defendant's expert on the issue of *Ta'widh*. Having perused the reports prepared by these two experts and having considered the factual matrix of the case before me, I am more inclined to accept the opinion of Dr Sherin as her report had been well supported by high authorities as illustrated above compared to the skeletal report prepared by Dr Abdul Halim.

[32] In view of the aforesaid, I would answer the question posed for this court's determination in the following manner:

(i) whether the defendant is entitled in law to charge the plaintiff *Ta'widh* arising from default in payment of the re-sale price of the properties in respect of an Islamic financing facility granted by the defendant to the plaintiff premised on the *Al-Bai Bithaman Ajil* ("BBA") pursuant to the property purchase agreement, property sale agreement and agency agreement all dated 9 March 1994;

(Answer in the negative)

(ii) whether the defendant is entitled in law to charge the plaintiff *Ta'widh* and whether the defendant is entitled to charge *Ta'widh* in the sum of RM10,384,262.88;

(Answer in the negative)

(iii) As the following two questions had been answered in the negative, this court make the following orders:

(a) A declaration that the defendant is not entitled to charge *Ta'widh* in law;

(b) An order for the defendant to return and/or pay the plaintiff the sum the defendant had taken as *Ta'widh* from the plaintiff which sum shall be assessed by the court. This was because the respective

parties could not confirm the actual amount of *Ta'widh*, which was deducted by the defendant and/or the actual amount of *Ta'widh* imposed by the defendant on the plaintiff in their respective affidavits;

(c) The claim for interest is denied as this is forbidden in Shariah and Islamic financing framework; and

(d) Costs of RM50,000 is allowed.

Conclusion

[33] Having considered the pleadings, the affidavits filed herein and the arguments by the respective learned counsel from both sides and having given the matter a very careful and serious consideration, accordingly I allowed the prayers sought by the plaintiff *vide* encl. 2 as stated in para. 32 above. I made an order for costs of RM50,000 for this OS to be paid by the defendant to the plaintiff. I considered this sum reasonable in view of the fact the plaintiff had to incur extra expenses to engage the services of an expert to prepare the expert report to assist this court in arriving at this decision.

[34] In arriving at this decision, I acknowledged that I had relied on the views of Dr Sherin binti Kuhibava, which I found to be more comprehensive and well supported by high authorities.